IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. ~~923~~ 78

UNITED STATES OF AMERICA, *Petitioner*

v.

THE ALLEN-BRADLEY COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

HARVEY W. PETERS
Counsel for Respondent
1308 North Prospect Avenue
Milwaukee 1, Wisconsin

DUDLEY J. GODFREY, JR.
WILLIAM A. JACKSON
Of Counsel

HANNERSMITH-KORTHEYER CO. MILWAUKEE

INDEX

CITATIONS

CASES

STATUTE

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 923

UNITED STATES OF AMERICA, *Petitioner*

v.

THE ALLEN-BRADLEY COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion of the Court of Claims and the dissenting opinion of Chief Judge Jones (Pet. App. A, pp. 12-13) have not yet been reported.

JURISDICTION

The order of the Court of Claims granting respondent's motion for summary judgment was entered on April 3, 1956 (Pet. App. A, p. 12). The petition for a writ of certiorari was filed on May 3, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Where the certifying authority duly certified that certain of the taxpayer's World War II emergency facilities were, in their entirety, necessary in the interest of national defense, did the certifying authority *also* have the authority to limit the amount of cost amortizable under Section 124 of the Internal Revenue Code of 1939 to only a part of the total cost of the certified emergency facilities?

STATEMENT

There was no dispute as to material facts in the Court below, since the facts alleged in the taxpayer's petition (R. 1-15) were admitted in the Government's answer (R. 17-18), and on the basis of such facts the Court of Claims granted the taxpayer's motion for summary judgment (Pet. App. A, p. 12). The facts may be summarized as follows:

During World War II taxpayer manufactured motor controls, radio resistors, and other radio parts which were in short supply at the time. Directly and indirectly substantial quantities of taxpayer's products were used in prosecution of the war. At the request of Government procurement officers, the taxpayer increased its production facilities so as to enable it to increase its production of these products. (R. 4-5)

During the period 1940 to 1945, inclusive, and in connection with such expansion, taxpayer filed for and was issued nine Certificates of Necessity pursuant to the provisions of Section 124 of the Internal Revenue Code of 1939. In each instance the certifying authority certified the emergency facilities described in the application as

being necessary in the interest of national defense.[1] However, in three instances the certifying authority limited the amount of cost amortizable under Section 124 to only a part of the total cost of the certified emergency facilities. The refusal to certify 100 percent of the cost of the facilities as amortizable under Section 124 was in accordance with an unpublished policy adopted by the certifying authorities of attempting to limit amortization to less than full (100%) cost of the facilities where they were presumably useful in post-war operations. (R.5)

The numbers of the three Necessity Certificates issued to the taxpayer wherein the certifying authority certified *all* of the facilities covered by the Certificates as being in the interest of national defense, but recommended that less than 100 percent of the cost of said facilities should be amortizable under Section 124; the dates the Necessity Certificates were issued; the cost of the facilities; and the portion of the total cost of the facilities deemed by the certifying authority to be amortizable under Section 124, were as follows (R. 7-10):

Necessity Certificate Number	Date Issued	Cost of the Facilities	Percentage of the Cost Deemed Amortizable
WD-N-27705-A	12-23-43	$1,014,930.34	80%
NC-2631	3-30-44	125,990.28	85%
NC-8542	4-4-45	38,913.75	35%

In accordance with the provisions of Section 124 of the Internal Revenue Code of 1939, taxpayer elected to take amortization deductions with respect to all of its

[1] The taxpayer would like to call the Court's attention to what it considers to be a crucial omission of fact in the Government's statement of the facts. The Government's statement of the facts fails to mention that *all* the emergency facilities described in the nine applications filed by the taxpayer were certified as being necessary in the interest of national defense by the certifying authority.

emergency facilities over a period which began with the month following their acquisition. Taxpayer later elected to terminate the amortization period on September 30, 1945, pursuant to a Presidential Proclamation declaring that the emergency had terminated. (R. 12)

Despite the fact that the certifying authorities had certified *all* the facilities covered by these three Certificates as being necessary in the interest of national defense, on its 1944 and 1945 fiscal year tax returns the taxpayer computed its amortization deductions on the facilities using only that percentage of their total cost set forth in the Certificate issued by the certifying authority as amortizable under Section 124. Thereafter, the taxpayer filed Claims for Refund in which it alleged that it overpaid its taxes for both the years 1944 and 1945 by reason of its failure to have used 100 percent of the cost of the facilities covered by these three Certificates in the computation of its amortization deductions. (R. 12-15)

After the Commissioner of Internal Revenue had rejected the Claims for Refund, the taxpayer brought suit in the Court below for a refund of $178,327.75 in excess profits taxes and declared value excess-profits tax paid for the years 1944 and 1945, plus statutory interest thereon, claiming that the Commissioner had erred in failing to allow it the full (100 percent of cost) amortization deductions under Section 124 to which it was entitled for said years. (R. 1-15) Since there was no material issue of fact involved, the Court below granted taxpayer's motion for summary judgment, relying upon its prior determinations of the same question in *Wickes Corp. v. United States,* 108 F. Supp. 616, and *Ohio Power Co. v. United States,* 129 F. Supp. 215, certiorari denied 350 U.S. 862, rehearing denied 350 U.S. 919. (Pet. App., pp. 12-13)

ARGUMENT

This proceeding involves the amortization of cost of World War II emergency facilities for tax deduction purposes under Section 124 of the Internal Revenue Code of 1939. The procedure of permitting amortization of cost of World War II defense facilities to be speedily amortized, for tax purposes, was intended to encourage construction and acquisition of production facilities for national defense purposes. The certifying authorities (first the Secretaries of War and Navy, later the War Production Board) proceeded under Section 124(f)(1) to certify that the construction or acquisition of a particular facility was "necessary in the interest of national defense during the emergency period".

In the instant case there is no dispute that in each and every instance the duly designated certifying authority determined that the facilities described in the plaintiff's application for a Necessity Certificate were necessary in the interest of national defense. (R. 5, 17) Predicated upon this fact, the Court of Claims decided that the entire (100%) cost of the defense facilities at issue were amortizable under Section 124 of the 1939 Code. Petitioner contends that something less than all (100%) of the cost of the particular facility is amortizable, relying upon the point that the certifying authority not only certified the entire facilities here at issue as necessary in the interest of national defense, but also specified the proportion (less than all) of cost that should be amortizable under Section 124.

Contrary to the assertion of the Government (Pet. 8-10), the Court below correctly held that under Section 124(f)(1) the certifying authorities merely had the single power to certify that the construction or acquisition of

the facility was "necessary in the interest of national defense", as it had previously held in *Wickes Corp. v. United States,* 108 F. Supp. 616, and *Ohio Power Co. v. United States,* 129 F. Supp. 215, certiorari denied, 350 U.S. 862, rehearing denied, 350 U.S. 919. Moreover, it is submitted that the decision of the Court below is not in direct conflict with either the decision of the Second Circuit in *Commissioner v. National Lead Co.,* 230 F. 2d 161 (C.A. 2) or the decision of the Court of Appeals for the District of Columbia Circuit in *United States Graphite Co. v. Sawyer,* 176 F. 2d 868, affirming *per curiam United States Graphite Co. v. Harriman,* 71 F. Supp. 944 (D.D.C.), certiorari denied 339 U.S. 904, and does not involve a question of general importance meriting further review by this Court.

1. **The decision below is correct, because the certifying authority certified the facilities were, in their entirety, necessary in the interest of national defense.**

The United States Court of Claims correctly decided in the instant case that where facilities were, in their entirety, certified as being necessary in the interest of national defense, the entire cost (100%) of said facilities are amortizable for tax purposes under Section 124 of the 1939 Code.

Section 124(f)(1) of the 1939 Code dealing with the amortizable base of World War II emergency facilities provides:

> "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939 as either the Secretary of War or the Secretary of the Navy has certified as necessary

> in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

Now in the instant case, taxpayer in its petition filed with the United States Court of Claims alleged (R. 5):

> "6(c) In connection with such expansion and pursuant to the provisions of Section 124 of the Internal Revenue Code of 1939, the plaintiff filed for and was issued nine Necessity Certificates. In each and every instance the duly designated certifying authority determined that the facilities described in the plaintiff's application for a Necessity Certificate were necessary in the interest of national defense. * * * "

In answer filed by the Government (R. 17) the foregoing allegation was admitted.

The facilities here at issue were erected, installed, or acquired after December 31, 1939, and the certifying authority duly certified that the facilities described in the taxpayer's applications for Necessity Certificates were, in their entirety, necessary in the interest of national defense. Accordingly, taxpayer respectfully asserts that the entire cost (100%) of such facilities so described is amortizable under Section 124(f)(1) of the 1939 Revenue Code.

The decision of the Court below is correct since it represents nothing more than an application of the long-established principle that was so clearly stated in *Dismuke v. United States,* 297 U.S. 167, 172, as follows:

> " * * * (T)he power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

The conclusion that Section 124 extends to the certifying authority the single power to determine whether the acquisition or construction of a facility was "necessary in the interest of national defense" is inescapable. Any other interpretation of Section 124 would do violence to the rule that words of a statute, including Revenue Acts, are to be interpreted in ordinary and usual senses. See *Crane v. Commissioner,* 331 U.S. 1, 5; *Old Colony Trust Co. v. Commissioner,* 301 U.S. 379, 382; *Helvering v. New York Trust Co.,* 292 U.S. 469, 474; *Reinecke v. Smith,* 289 U.S. 114, 115.

Any doubts as to the correctness of the interpretation given to Section 124 by the Court below are completely dispelled by its legislative history. A review of the legislative history of Section 124 shows that Congress actually intended to *withhold* from the certifying authority the power to certify a percentage of the total cost of the emergency facilities where it determined that the facilities were "necessary in the interest of national defense". See H.R. Report No. 2894, 76 Cong. 3d Sess. (1940) p. 38; Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76 Cong. 3d Sess. (1940) pp. 124, 158, 159; and Congressional Record, Aug. 28, 1940, pp. 11240, 11246.

The report of the Ways and Means Committee stated:[2]

> "Section 124 provides that a corporation shall be allowed a deduction for income and excess profits tax purposes for the amortization of certain facilities which * * * either the Secretary of War or the Secretary of the Navy certify as necessary in the interest of national defense during the present emergency. Such facilities are land, buildings, machinery and equipment or parts thereof acquired after July 10,

[2] H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38.

1940 (changed to December 31, 1939), or the construction, reconstruction, erection, or installation of which was completed after July 10, 1940 (changed to December 31, 1939) * * * Although a facility may be an emergency facility even though its construction was begun on or before July 10, 1940 (changed to December 31, 1939), only so much of its adjusted basis as is attributable to certified construction taking place after July 10, 1940 (changed to December 31, 1939), is subject to amortization. The remainder of the adjusted basis is subject to depreciation. * * * "

2. The decision of the court below is not in conflict with either the decision of the Second Circuit in the National Lead case, or the decision of the Court of Appeals of the District of Columbia in the Graphite case.

The issue before the Second Circuit in the *National Lead* case is not the same as that before the Court of Claims in the instant case. In *National Lead* the facilities in question were never certified as being necessary in the interest of national defense in their entirety. In this connection the Second Circuit said (p. 162):

> "Since the Board (War Production Board) never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. * * * "

The decision of the Court of Claims in the instant case is not in conflict with the *National Lead* decision because in *National Lead* the Second Circuit never reached the question of the percentage of cost to be amortized for tax purposes where the facilities in question had in their entirety been duly certified as being necessary in the interest of the national defense.

A different issue was involved in the *Graphite* case than is involved in the instant case. In the *Graphite* case the taxpayer sought a writ of mandamus directing the War Production Board to eliminate the 35 percent of cost limitation from the same Certificate of Necessity ultimately at issue in the *Wickes* case. The writ was denied. Admittedly the District Court in the *Graphite* case interpreted Section 124(f)(1) as granting authority to the War Production Board to certify both the necessity of the facilities and the percentage of cost entitled to amortization. But it does follow, *a fortiorari,* that the *Graphite* decision conflicts with the decisions of the Court below in this case and in the *Wickes* and *Ohio Power* cases since it is hornbook law that the extraordinary writ of mandamus will not be issued to the governmental agency where the litigant has an adequate remedy at law. Indeed, the later decision of the Court of Claims in the tax refund petition of the Wickes Corporation, successor to the U. S. Graphite Company, demonstrates that there was no legal basis for the issuance of a writ of mandamus in the *Graphite* case.

If the Government really believes that the decisions in this case and the *Ohio Power* and *Wickes* cases conflict with the *Graphite* case, it is difficult to understand why the Government did not apply for a writ of certiorari in the *Wickes* case at the time it was decided more than two years ago, since the Solicitor General is virtually bound to bring conflicts in decisions of coordinate courts to the attention of this Court. Moreover, by the same reasoning it is also difficult to understand why the Government failed to assert the defense of *res judicata* in the *Wickes* case if it believes it to be in conflict with the *Graphite* case.

3. The issue involved is not of such importance as to merit further review by this Court. It is stale and without importance to the administration of the current revenue laws.

The certifying provisions of Section 124 under which this case arose expired with the end of the emergency in 1945. In 1950 Congress enacted a new rapid amortization law as a part of the Excess Profits Tax Act of 1950 (Section 124A of the Internal Revenue Code of 1939), in which it added a new clause conferring upon the certifying agency for the first time the dual power to certify both (1) the necessity of the facilities, and (2) the amount of the amortizable cost. Thus, a review by this Court will not aid in the administration of current law. See Stern, *Denial of Certiorari Despite a Conflict,* 66 Harv. L. Rev. 465, 466-468.

Nor is the issue as important in terms of pending litigation as the Government would lead the Court to believe. As has been pointed out by counsel in his brief in opposition to a motion of the United States for leave to file a petition for rehearing in *United States v. Ohio Power Co.,* No. 312, October Term, 1955, pp. 23-24, at least two of the cases pending in lower courts which Internal Revenue Service claims involve the same problem do not involve percentage certificates of any kind and actually raise an altogether different issue.[3] How many of the 39 cases said to be pending at the administrative level actually involve the percentage amortization issue counsel does not know. But in any event it is clear that the Government has grossly inflated the amount involved by failing to take into account the recapture in later years of a substantial part

[3] *United States Pipe and Foundry Co. v. United States,* Court of Claims No. 245-54 involving a gross amount of $1,314,851.03; *Milton Bradley Co. v. United States,* Dist. Ct. for D. of Mass., decided April 3, 1956, involving $2,476.18.

of the taxes involved through disallowance of depreciation on facilities completely amortized during the war period.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no question calling for review by this Court is presented. The petition should, therefore, be denied.

Respectfully submitted,

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 1, Wisconsin

DUDLEY J. GODFREY, JR.
WILLIAM A. JACKSON
Of Counsel

May, 1956